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Decision

Matter of: IT Facility Services-Joint Venture

File: B-285841

Date: October 17, 2000

Richard L. Moorhouse, Esq., Karen R. Harbaugh, Esq., Mary Kay Ogden, Esq., and Lawrence A. Demase, Esq., Reed Smith Shaw & McClay, and Paul C. Smith, Esq., IT Corporation, for the protester.

Stuart B. Nibley, Esq., and Joseph J. Dyer, Esq., Seyfarth Shaw Fairweather & Geraldson, and Gregory P. Durham, Esq., Lau, Lane, Pieper, Conley & McCreddie, and Paul E. Pompeo, Esq., for Johnson Controls World Services, Inc., an intervenor. Raymond M. Saunders, Esq., Department of the Army, for the agency.

Guy R. Petrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably found the protester's proposed staffing levels too low in certain functional areas, based upon the agency's reasonable assessment of the time and effort required to perform the contract tasks and of the protester's approach to performing the work.
2. Agency conducted meaningful discussions with the protester concerning its low evaluated staffing levels in certain functional areas where the agency informed the protester of the agency's concerns and of the amount by which the agency found the protester's proposed staffing low in these areas.
3. Agency reasonably determined that employees within the function under study in a cost comparison under Office of Management and Budget Circular A-76 could be on the source selection evaluation board for the competition among private-sector offerors, where the agency determined that these employees would not be directly affected by the cost comparison because their positions were not in jeopardy.
4. Protest of a competition among private-sector offerors under Office of Management and Budget Circular A-76, objecting that a source selection evaluation board evaluator whose spouse holds a position under study has a conflict of interest is denied, where the protester was not prejudiced by the evaluator's alleged conflict

of interest because, even if that individual's evaluation is set aside, the protester's proposal was reasonably determined to be unacceptable.

5. Protest challenging the agency's use of a contractor to assist the agency in the preparation of the most efficient organization (MEO) and the evaluation of private-sector offers, including the preparation of an independent government estimate, in connection with a solicitation issued under Office of Management and Budget Circular A-76, is denied, where the contractor used discrete sets of employees to perform the various tasks and used a "firewall" to keep confidential the preparation of the MEO and management study, as well as the evaluation of the offers.

DECISION

IT Facility Services-Joint Venture protests the rejection of its proposal as technically unacceptable and the award of a contract to Johnson Controls World Services, Inc. under request for proposals (RFP) No. DABT60-98-R-0017, issued by the Department of the Army for public works and logistics services at Fort Lee, Virginia. IT challenges the Army's evaluation of its proposal and conduct of discussions, and asserts that the competition was tainted by conflicts of interest.

We deny the protest.

The RFP was issued as part of a cost comparison under Office of Management and Budget (OMB) Circular No. A-76 to determine whether it would be more economical to accomplish the work in-house using government employees or by contract. In the event that a contractor was selected to perform these functions, the RFP provided for the award of a cost-plus-award-fee contract for a base year with 4 option years and with phase-in and phase-out periods. RFP at F-1.

The RFP provided a detailed performance work statement (PWS) describing the required services. The work to be performed was divided into two functional areas: public works and logistics. In the public works area, the contractor will provide buildings and structures maintenance, family housing maintenance, utility systems operation and maintenance, heating/ventilation/air conditioning systems operation and maintenance, dining and laundry facility equipment maintenance, grounds maintenance, surfaced area maintenance, pest control, and "U-DO-IT" services. In the logistics area, the contractor will provide transportation services, base supply services, and material maintenance. For each of these functional areas, the PWS provided historical workload data to allow offerors to forecast the anticipated level of effort required and provided detailed performance specifications. The RFP also provided for a pre-proposal conference, site visit, and tour of the facilities. RFP at L-11.

Offerors were informed that proposals would be evaluated in a two-phased procedure. First, the agency would evaluate offerors' past performance, experience, key personnel, and phase-in and quality control plans. As a result of this evaluation,

offerors would be informed that they were either a “possible candidate for award (PCA)” or “unlikely candidate for award (UCA).” RFP at L.14. Those offerors that were identified as PCAs and those that were UCAs but wished nonetheless to proceed were asked to make an oral presentations in the second phase. The agency would then evaluate, in this phase, offerors’ oral presentations, technical approaches, staffing plans, cost proposals, subcontracting participation plans, and completed solicitation documents.

The RFP provided that the basis for award would be the technically acceptable offer with the lowest probable cost. Offerors were informed that proposals would be evaluated as either acceptable, marginal, or unacceptable, and that only offers that were technically acceptable after assessing all factors and subfactors would be considered for award. The following technical evaluation factors were identified: past performance/experience; technical capability (“How the contractor will accomplish the requirements of the PWS”); management approach; and subcontracting. Subfactors were identified for each of these factors.

The RFP also provided instructions for the preparation of proposals and the conduct of the oral presentations. Among other things, offerors were directed to provide a written technical approach, not exceeding 20 pages, that corresponded to the oral presentation and was cross-referenced to the cost proposal and staffing plan. RFP at L.16. With respect to the oral presentation, offerors were informed that no more than 120 “slides” could be presented and that only those slides that were projected and substantially addressed would be considered. At the oral presentation, offerors were required to demonstrate their understanding of the work required by the PWS. RFP at L.21.c.15.

The Army received six offers, including those of IT and Johnson Controls. All of the offerors were found to be PCAs and were invited to make oral presentations. Agency Report, Tab G.1., Source Selection Evaluation Board (SSEB) Phase I Report. All of the offerors made oral presentations, which, along with the remainder of the offerors’ proposals, were evaluated by the SSEB. The SSEB determined that only Johnson Controls’ initial proposal was technically acceptable.

IT’s initial technical proposal was determined to be marginal, but capable of being made acceptable if discussions were conducted. IT’s marginal rating was attributable to the SSEB’s assessment that IT’s staffing in certain areas was too low, that IT failed to provide sufficient detail to allow staffing to be tracked directly to a task, and that although IT stated that it would use “cross leveling of positions to accommodate many duties” this was not explained. In addition, IT’s staffing in the cost proposal was lower than that proposed in the technical proposal. Agency Report, Tab G.2., SSEB Initial Phase II Report. IT’s staffing shortfall was found to

fall within two areas: scheduled tasks and work orders.¹ As a tool to evaluate the offerors' proposed staffing levels, the SSEB compared the offerors' proposed full-time equivalents (FTE) for each functional area to a range of estimated realistic FTEs for each functional area; the SSEB then reviewed offerors' proposed staffing levels taking into account their respective technical approaches to accomplishing the work with the proposed staffing.

Discussions were conducted with the offerors. IT received 22 specific questions concerning its initial proposal. Among other things, the Army informed IT of the discrepancy in the staffing proposed in its technical and cost proposals. The agency also asked IT the following:

The staffing in the area of scheduled tasks appears low by approximately [DELETED] manhours per year. Please review.

The staffing in the area of Work Orders appears low by approximately [DELETED] manhours per year. Please review.

The details provided on staffing were not sufficient to allow for tracking the staffing directly to the efforts to be performed. Please provide explanation as to how each requirement of the PWS will be covered by the staffing.

Agency Report, Tab E.6, Request for Final Proposal Revisions (FPR), encl. 2, at 1, 3.

IT responded to the agency's discussions in a FPR. With respect to its staffing in the scheduled tasks area, IT made no adjustment in its proposed staffing, contending that its proposal estimates were accurate and explaining why it felt this was the case. With respect to its staffing in the work order area, IT slightly increased its proposed staffing (by [DELETED] hours), stating that, based upon IT's experience on other similar contracts, its staffing was adequate. Agency Report, Tab E.8, IT FPR, at 3-4.

The SSEB found that IT's FPR did not resolve the evaluators' concerns with the firm's proposed staffing and concluded that IT's offer was not technically acceptable.

¹ "Scheduled tasks" are scheduled preventive maintenance in the public works areas, including buildings and structures, family housing, utilities, dining facilities, grounds, surfaced areas, and pest control. Agency Report, Tab H, Prenegotiation Objective Memorandum, at 4. "Work orders" refer to work associated with repair of non-real property, such as, for example, repair of fire trucks, snow removal equipment, generators, vehicles (commercial and military), firing range equipment, tactical radios, televisions, videocassette recorders, and small arms, in the material maintenance function in the logistics area. Id. at 5.

Specifically, in the scheduled tasks portion of the public works area, the SSEB determined that IT's proposed staffing was below the low, acceptable limit by [DELETED] FTEs; specifically, the SSEB calculated that between [DELETED] and [DELETED] FTEs were required to perform the scheduled tasks functional areas, but IT proposed only [DELETED] FTEs to perform these functions. Although this was primarily in the family housing (for which the SSEB estimated that between [DELETED] and [DELETED] FTEs were required and IT proposed only [DELETED] FTEs) and utilities (for which the SSEB estimated between [DELETED] and [DELETED] FTEs were required and IT proposed only [DELETED] FTEs) functional areas, IT's proposed staffing was low in almost all the scheduled tasks functional areas. The SSEB concluded that IT could not perform these requirements with the staffing proposed by cross-training and cross-utilizing personnel, as IT promised, because IT simply did not propose sufficient overall staff from which to draw. Agency Report, Tab I, Post-Negotiation Memorandum, at 4.

IT's response to the agency's question regarding the firm's staffing in the work order area was also found not to allay the evaluators' concerns. Although the Army had informed IT that its proposed staffing in this area was low by nearly [DELETED] staff hours, IT increased its staffing by only [DELETED] hours. The SSEB concluded that IT's proposed work order staffing was too low by [DELETED] FTEs; the SSEB estimated that a minimum of [DELETED] FTEs were required to adequately perform the public works area, but IT proposed only [DELETED] FTEs to perform this work. In this regard, the SSEB determined that IT had not proposed "any innovative approaches to perform the work and that the overall numbers of FTEs proposed [were] so low in every area, there were not additional FTEs from which the work order area could draw if necessary." Id.

The agency's source selection advisory council (SSAC) and source selection authority (SSA) were briefed on the results of the technical and cost evaluations. The SSEB found that all of the offers, but IT's, were technically acceptable and recommended that the source selection authority select Johnson Controls, on the basis of its low evaluated cost offer, to be the private contractor to compete against the agency's most efficient organization (MEO) in the public-private competition.² Agency Report, Tab J, SSAC/SSA Briefing, at 25. The SSA adopted this recommendation.

In the public-private cost comparison, the Army determined that retaining the services in-house was more cost effective than awarding a contract to Johnson Controls. After a debriefing, IT filed an agency-level protest challenging the evaluation of its proposal and the conduct of discussions, and asserting that some

² IT's final proposed cost was \$[DELETED] million and its evaluated cost was \$[DELETED] million. Johnson Controls' final proposed cost was \$39.2 million and its evaluated cost was \$[DELETED] million.

members of the SSEB had conflict of interests. In addition, IT and Johnson Controls filed appeals to the agency's Administrative Appeal Board (AAB) challenging the agency's cost comparison. The Army denied IT's agency-level protest, and IT filed this protest with our Office. Subsequently, the AAB granted IT's and Johnson Controls' appeals in part, finding that the MEO was understated and directing adjustments to the MEO. The MEO was adjusted by adding approximately 49 FTEs, which resulted in the selection of Johnson Controls' offer to perform the work.

IT complains that the Army unreasonably found IT's proposed staffing low, which resulted in the improper exclusion of IT's low-priced offer from the competition. IT contends that, given its experience in providing services of this type under three other facility management contracts, its proposed approach and staffing should have been found acceptable.³ IT challenges the agency's use of an estimated staffing range for each functional area in its evaluation of proposals, and contends that the Army has not demonstrated the reasonableness of its staffing estimates, that the estimates are based upon information not available to the offerors, and that the Army miscalculated the number of staffhours required to perform the work orders in the logistics area and that a proper calculation would demonstrate that IT's proposed staffing level for this area was acceptable.

Our review of the competition among private offerors, conducted as part of an A-76 study, is no different from our review of any other competition for a federal contract. In reviewing protests against allegedly improper evaluations, we do not independently reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

First, we find reasonable the evaluation methodology used by the Army to assess the realism of IT's and the other offerors' proposed staffing levels. Prior to the competition, an independent government estimate (IGE) was prepared by Management Analysis, Incorporated (MAI) for the Army. The IGE is a line-by-line estimate of the costs associated with the work requirements of the PWS. The Army has provided statements from MAI personnel that state that the IGE was prepared

³ IT initially complained that, although the Army found IT's [DELETED] proposed total FTEs low, the MEO only proposed 134 FTEs. Subsequent to its protest to our Office, the AAB found that the MEO's proposed staffing was understated and increased the MEO's proposed staffing by 49 FTEs. Although IT suggests in its comments that the MEO staffing levels may have influenced the evaluators, the record establishes that the evaluators did not have access to the MEO and were unaware of the MEO's staffing levels.

from historical Fort Lee data, cost information from RS Means Company, Inc.,⁴ and technical estimates of MAI staff employees and Fort Lee personnel. The IGE was reviewed by the four Fort Lee SSEB members, who developed a realistic range of staffing for each functional area.⁵

In evaluating the offerors' proposed staffing levels, the SSEB compared an offeror's staffing for a functional area against the agency's stated range for the area, using a 10-percent deviation factor. The agency did not mechanically evaluate offerors' proposed staffing against its estimated range. Rather, as explained by the contracting officer,

[t]he actual determination was a subjective decision based on the information at hand including the offeror's proposed approach. In other words, an offer that was more than 10 [percent] low in one or more areas could still be acceptable, if the overall staffing was considered adequate or if an innovative approach had been proposed. Further, the 10 [percent deviation factor] gave each proposal an increased chance of being acceptable and worked to the advantage of the offerors.

Contacting Officer's Statement at 7.

The protester complains that this explanation, as well as the remainder of the record, fails to prove that the agency's estimates are reasonable. We disagree. Here, the record contains a detailed explanation as to how the agency developed its range of staffing estimates. The agency's calculations and explanations appear reasonable on their face. As the agency notes, IT relied upon a similar explanation, in response to the agency's discussion questions, when IT argued that its lower staffing in the scheduled tasks area should be found reasonable because it was based upon IT's historical data and the use of productivity standards, such as those supplied by RS Means. See Agency Report, Tab E.8, IT Proposal Revisions, at 1.1-2. The protester simply does not show that the agency's estimates are unreasonable. Rather, the protester merely disagrees with the Army's judgment. That disagreement does not

⁴ RS Means provides construction cost information used by contractors, engineers, and others to forecast costs of building and renovation projects and facilities maintenance and repair.

⁵ For example, for the family housing maintenance functional area, the SSEB stated a range of between [DELETED] to [DELETED] FTEs.

demonstrate that the agency's estimates are unreasonable.⁶ UNICCO Gov't Servs., Inc., supra, at 7.

We also do not find that the agency's staffing estimates are based on information that was required to be produced to the offerors. Specifically, IT complains that in computing the estimated staffing range, the agency relied upon its own knowledge of the condition of buildings and equipment and considered travel time required to perform the required services. IT argues that this information should have been disclosed to the offerors.⁷ We find no merit to this argument. Offerors were invited to participate in a site and facilities visit, at which the offerors could make their own judgments as to the condition of buildings and equipment and as to the amount of travel time required. We do not think the agency was required to disclose its own judgment as to these matters, inasmuch as the RFP sought to test the offerors' understanding and ability to perform the contract requirements.

IT also argues that the Army miscalculated the number of staffhours required to perform the work orders in the logistics area and that a proper calculation would demonstrate that IT's proposed staffing level for this area was acceptable. Specifically, IT argues that the Army's average work order time is overstated ([DELETED] hours on average compared to IT's [DELETED] hours on average). In reply, the Army provided its calculations, based upon the PWS, supporting its estimated average work order time. See MAI Memo 2-6 (Sept. 12, 2000). The average time per work order was calculated by taking the number of work orders provided in the PWS (8,025 work orders)⁸ and applying the agency's judgment as to the level of complexity and time required for each "craft" making up the work orders.⁹

⁶ Throughout the protest, IT has asserted that the agency had not demonstrated that its documentation and explanations reasonably support the agency's actions. Where, as here, the agency's documentation and explanations are not unreasonable on their face, we will not sustain such protest grounds based only on the protester's disagreement. Ogden Support Servs., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 3.

⁷ Although IT also apparently believes that the IGE should have been disclosed to the offerors, it cites no authority (nor are we aware of any) requiring such disclosure.

⁸ Although, in response to the protest, MAI has performed a number of calculations, which use various total work order numbers, we have relied upon MAI's calculation based upon 8,025 work orders (see MAI Memo 2-6 (Sept. 12, 2000)), which is the number IT also relied upon in its protest. See Protest, exh. O (July 14, 2000). IT did not challenge this figure in its initial protest, and any objection now would be untimely.

⁹ "Craft" refers to trades, such as electrical mechanic or mobile equipment servicing. The crafts, and the percentage of work orders associated with them, were stated in PWS, Technical Exhibit 5.1-007.

From our review, we have confirmed the Army's calculations indicate an average of [DELETED] hours per work order and that the Army did not miscalculate this figure. While IT complains that the Army's judgment as to the complexity and time to perform certain work order tasks is based upon sources not available to IT, such as former military maintenance officers and agency personnel, see IT Final Submission at 11, this complaint is again essentially based upon IT's belief that the agency was required to disclose in the RFP the Army's own judgment as to time required to perform the work orders. However, as noted, the offerors were asked for their own judgment as to the complexity and time required to perform the work orders.

IT also complains that the Army did not adequately consider its innovative technical approach and past performance on other facility management contracts. The record belies this complaint. Specifically, the SSEB noted IT's proposed approach to cross-utilize personnel and claimed experience, but found that IT's overall staffing was so low that the firm simply did not have sufficient additional personnel from which IT could successfully "pull" personnel to perform the work. Even though IT was provided with an opportunity to further explain how it would be able to perform at its proposed staffing levels, it did not avail itself of this opportunity, but provided basically the same explanation in its FPR that was given in its initial proposal. We find that the agency reasonably decided not to accept IT's explanation for its low staffing, which was grounded upon IT's belief that the Army should essentially accept IT's staffing estimates because of IT's experience with other facility management contracts and its promised, but insufficiently explained, cross-utilization of personnel.

In sum, we find from the record that the Army's evaluation of IT's proposal as unacceptable because of its staffing shortfall was reasonable and in accord with the evaluation criteria.¹⁰

IT also protests that the discussions the Army conducted were not meaningful because the agency did not "inform [IT] that its proposal was in jeopardy of being rejected if it did not increase its staffing levels in two areas--[public works] Family Housing Maintenance and [logistics] work orders." Protester's Comments at 14.

¹⁰ IT also complains that its proposal should have been selected for award, even if its proposed staffing was too low, because it offered the lowest probable cost of performance, even after the Army's cost realism adjustment to account for its low staffing. This argument ignores the specific provision in the RFP that, to be considered for award, an offer must be found acceptable under each of the evaluation factors and subfactors. Here, IT's proposal was not acceptable under the staffing subfactors of the technical capability factor.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful, equitable, and not misleading. 10 U.S.C. § 2305(b)(4)(A)(i) (1994); Federal Acquisition Regulation (FAR) § 15.306(d)(1); Du and Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7. For discussions to be meaningful, they must lead offerors into the areas of their proposals requiring amplification or revision. While the discussions should be as specific as practical considerations will permit, the agency is not required to "spoon-feed" an offeror as to each and every item that could be revised so as to improve its proposal, however. Du and Assocs., Inc., *supra*, at 7-8; Biospherics, Inc., B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161 at 6.

We find that the Army conducted meaningful discussions with IT because the agency led the protester into the areas of its proposal requiring amplification. Specifically, with respect to the agency's concern with IT's staffing levels, the Army not only informed the firm that the agency viewed its staffing as low for scheduled tasks (which provide for performance of scheduled work in the public works area) and for work orders (which provide for performance of work in the logistics area), but specifically identified the amount of IT's staffing shortage. See Agency Report, Tab E.6, Request for FPR, encl. 2, at 1, 3. The agency also asked that the offeror provide an explanation as to how it intended to satisfy the PWS with its proposed staffing. These questions should reasonably have led IT to address the agency's evaluated concern with IT's staffing levels in these two areas as well as its concern that IT's overall staffing was too low to allow for its proposed cross-utilization of personnel. Having led IT to the areas of its proposal requiring amplification, we do not think the Army was required to warn IT, as the protester apparently believes, that failure to adequately explain or adjust its staffing could result in the rejection of its proposal. See Du and Assocs., Inc., *supra*, at 7-8.

The protester nevertheless contends that the Army had an obligation to "continue discussions" with IT concerning the firm's staffing if the Army's concerns were not allayed by IT's FPR. Protest at 28. The Army was not required to reopen discussions with IT where the Army found, after providing IT with meaningful discussions, that IT's FPR explanation of its staffing did not alleviate the agency's concerns. See Nomura Enter. Inc., B-251889.2, May 6, 1993, 93-1 CPD ¶ 490 at 5-6.

IT also protests that the evaluation of its proposal was tainted by conflicts of interest of some members of the SSEB. Specifically, IT complains that four of the seven SSEB members are employees at Fort Lee working in the public works and logistics area that are under study. IT also objects that one of these SSEB members from Fort Lee is married to a person whose position is under study. Citing our decision in DZS/Baker LLC; Morrison Knudsen Corp., B-281224 *et al.*, Jan. 12, 1999, 99-1 CPD ¶ 19 at 7, IT contends that we must presume prejudice to IT because of these conflicts.

In conducting government business, including the evaluation of proposals as part of an A-76 study, the general rule is to avoid any conflict of interest or even the appearance of a conflict of interest. FAR § 3.101-1. A conflict of interest is found to exist when, “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired.” FAR § 9.501(d). We have held that at least the appearance of a conflict of interest exists where, in an A-76 cost comparison, an evaluator holds a position that is within the scope of the study and is subject to being contracted out. See DZS/Baker LLC; Morrison Knudsen Corp., *supra*, at 5. A significant actual or apparent conflict of interest on the part of evaluators whose positions are under study taints not only the individual source selection, but undermines the integrity of the A-76 process and the procurement system overall. GAO Letter to the Office of Government Ethics Regarding Conflicts of Interest in A-76 Cost Comparisons, B-281224.8, Nov. 19, 1999, 99-2 CPD ¶ 103 at 2.

The Army contends that no conflict exists here. Specifically, the Army states that none of the four Fort Lee employees serving on the SSEB hold positions that are under the study and that therefore these employees would not be directly affected by whatever the outcome of the procurement. Agency Report at 7-10. In selecting its SSEB members, the Army relied upon Department of Army Pamphlet (DA Pam.) 5-20, “Commercial Activities Study Guide,” which states in pertinent part that the SSEB “cannot include any members who may be directly affected by the cost comparison decision, including members of . . . [t]he function under [commercial activities] study.” DA Pam. 5.20, § 6-20(c) (July 31, 1998) (emphasis added). This provision was clarified by the Army not to preclude employees of the function under study from serving on an evaluation board where those employees’ positions were not in jeopardy from the competition; these employees were not seen as being “directly affected” by the cost comparison. Agency Report, Tab 5, Army Decision of IT’s Agency-Level Protest, encl. 2, Memorandum of Assistant Chief of Staff for Installation Management, 2 (Aug. 16, 1999).

The protester does not assert that these evaluators’ positions are in jeopardy, but requests that we find that “no Government employee who works in a functional area under study . . . may serve on an SSEB even if the individual’s job at present is not determined to be in danger upon award to the private sector.” Protester’s Comments at 17. In this regard, the protester argues that the evaluators’ objectivity may be impaired because of, among other things, their relationship with colleagues or subordinates who hold positions that are at risk. Protest at 15.

A contracting officer is required to identify and evaluate potential conflicts as early in the procurement process as possible, and to avoid, neutralize or mitigate significant conflicts. FAR § 9.504(a). The responsibility for determining whether a conflict exists rests with the contracting agency, and we will not overturn the

agency's judgment in this regard unless it is shown to be unreasonable. Battelle Memorial Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 12.

Here, we find reasonable the Army's determination that the inclusion of these Fort Lee employees on the SSEB did not create a conflict or apparent conflict of interest. The protester has not shown that these employees will be directly affected by the outcome of the procurement; that is, none of these employees' positions are subject to being contracted out.¹¹ Although IT is concerned that these employees may yet be biased because of their employment within the areas under study, these concerns are too speculative and tenuous to establish that the agency's judgment was unreasonable. See American Mgmt. Sys., Inc., B-285645, Sept. 8, 2000, 2000 CPD ¶ __ at 6 (benefit from current procurement to a contractor is too speculative and remote to establish a significant organizational conflict of interest).

The Army also contends that no conflict exists with respect to the one SSEB member who is married to someone holding a position under study. We disagree and find the appearance of a conflict of interest, at the least. Unlike the situation described above, this evaluator could clearly be directly affected by the outcome of this procurement, inasmuch as her spouse's job is subject to being contracted out. Although the Army contends that the evaluator's spouse will likely lose his job even if the work is retained by the government, this does not alleviate the apparent influence of her spouse's employment situation upon the evaluator. In our judgment, this evaluator should not have been allowed to serve on the SSEB. See Applied Resources Corp., B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272 at 3-4, recon. denied, B-249258.2, Feb. 26, 1993, 93-1 CPD ¶ 180 (disqualification of a bidder was reasonable where the spouse of the bidder's president was the contracting officer's supervisor and had access to the government estimate). Nevertheless, as explained below, we do not find any possible prejudice to the protester because the conflict of interest in this case is not significant.

Although it is true, as asserted by the protester, that we presumed prejudice to the protester in DZS/Baker LLC; Morrison Knudsen Corp., *supra*, at 7, in that case, the conflict of interest was so broad and severe (14 of the 16 evaluators held positions under study) that there was no objective way (such as by reviewing the evaluation record) to ascertain whether the protester was potentially affected by the conflict.

¹¹ The protester primarily relies upon the recent OMB amendment of the OMB Circular A-76 Revised Supplemental Handbook on August 31, 2000, to provide that "[i]ndividuals who hold positions in the function under study should not be members of the team, unless an exception is authorized by the head of the contracting activity." See 65 Fed. Reg. 54,568, 54,570, Sept. 8, 2000. However, since this revision became effective after the date of the cost comparison here, it is not applicable. We do not address whether the revision would have affected the outcome here, if it had been applicable.

In contrast, in Battelle Memorial Inst., *supra*, at 12, we did not find that a protester was prejudiced by two evaluators' apparent conflicts of interest where the record established that the conflicts of interest were not significant. As is the case in all protests, where the record does not demonstrate that, but for the agency's actions, the protester would have a reasonable chance of receiving award, we will not sustain a protest, even if a deficiency in the procurement is found. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Here, the record consists of the individual scoring and narrative evaluation sheets and consensus evaluation documents of the SSEB. From these documents, we are able to compare the evaluation of the one, apparently conflicted, evaluator with that of her colleagues. That comparison shows that the conflicted evaluator's scores were in line with most of the SSEB. That is, the individual scoring sheets establish that all but one evaluator (not the conflicted evaluator) found IT's proposal to be marginal or unacceptable overall; four of the remaining six evaluators (excluding the conflicted evaluator) had problems with IT's staffing and found IT's proposal to be either marginal or unacceptable with respect to its staffing.¹² Even ignoring the conflicted evaluator's ratings, IT's proposal was found marginal or unacceptable for its staffing, and there is nothing in this record showing that the conflicted evaluator influenced the scoring of the other evaluators. Given this record, we see no possible prejudice to IT because of the evaluator's apparent conflict of interest.

IT also complains that MAI, the contractor that assisted the Army in the creation of the MEO and of the IGE, has an improper organizational conflict of interest that taints this procurement.

The rules governing the A-76 cost comparison process provide that the government's management plan, MEO, and in-house cost estimate will be prepared confidentially and kept separate from the evaluation of contractors' bids or proposals. To this end, agencies are informed that these documents are procurement sensitive and must be sealed and delivered to the contracting officer prior to the receipt of offers. OMB Circular No. A-76, Revised Supplemental Handbook, ch. 3, ¶ F, "Safeguarding the MEO." The FAR also requires the confidentiality of the cost estimate of government performance until after negotiations are completed and the most advantageous offer has been selected and provides:

¹² While IT complains of the differences in the scoring between the evaluators and points to the scores of the one evaluator that would have found IT's initial proposal acceptable, we note that it is not unusual for evaluators to reach different conclusions and assign different scores when evaluating proposals; the mere presence of such alleged "inconsistencies" does not provide a basis for disturbing an award. See Executive Sec. & Eng'g Techs., Inc., B-270518 *et al.*, Mar. 15, 1996, 96-1 CPD ¶ 156 at 3 n.2.

Personnel who have knowledge of the cost figures in the cost estimate for Government performance shall not participate in the offer-evaluation process unless the contract file is adequately documented to show that no other qualified personnel were available.

FAR § 7.304(d).

The Army asserts that MAI's support activities were not improper because MAI ensured that the MAI employees supporting the preparation of the MEO were separate and distinct from the employees providing support for the IGE and cost realism analysis; this separation was ensured by a "firewall" between the two discrete sets of MAI employees performing these tasks.

From our review of the record, we find no basis to object to the Army's or MAI's handling of the MEO and cost estimate for government performance. We disagree with IT's apparent belief that MAI presents an organizational conflict of interest merely because MAI, as an organization, was involved in both preparing the MEO and assisting the evaluation teams; in fact, there is no law or regulation prohibiting this practice. The record establishes that the Army and MEO were well aware of the need to keep these functions separate and confidential, and that this separation and confidentiality were maintained by use of discrete sets of employees and a firewall.

IT nevertheless points to the written statements provided by the MAI employees to the Army which IT asserts belie MAI's claimed effectiveness of the "firewall" with respect to the private offerors' competition.¹³ For example, IT points to the statement of a MAI employee who reviewed the IGE and provided cost realism support; this employee states that early in the process she provided some ideas to the management study team, but never saw the MEO nor received any feedback as to

¹³ We note that some of the MAI statements to which IT points would only relate to alleged conflicts of interest in the public-private competition. For example, IT points to the statement of an MAI employee who states that he was a team leader for the effort to develop the PWS and had a minor role in the development of the MEO with respect to the workload data in the logistics area; he states, however, that he never saw the IGE or had any involvement with the evaluation and source selection in the private-private competition. Because IT was properly not selected to participate in the public-private competition (which ultimately resulted in the award of contract to Johnson Controls), it is not an interested party to raise these concerns in this protest. See The Hines-Ike Co., B-270693, Mar. 15, 1996, 96-1 CPD ¶ 158 at 4-5.

whether any of her comments were accepted.¹⁴ Contrary to the protester's arguments, we find that the record actually supports the agency's statements that MAI created an effective firewall that was not breached. That is, all of the MAI statements show that no one having access to the MEO and cost estimate for government performance was involved in the evaluation of private-sector offerors' proposals.

The protest is denied.

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Acting General Counsel

¹⁴ An apparent conflict of interest could be said to exist in the private-private competition where evaluators (or those supporting the evaluation) had access to the MEO or cost estimate for government performance. See FAR § 7.304(d).